Supreme Court, U.S.
FILED
MAR 4 - 2010
OFFICE OF THE CLERK

No. 09-489

IN THE

Supreme Court of the United States

THERESA D'JAMOOS, ET AL.,
Petitioners,

v.

PILATUS AIRCRAFT, LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

JEFFREY BALTRUZAK
McDERMOTT WILL & EMERY LLP
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000
jbaltruzak@mwe.com

BRUCE J. BERMAN
Counsel of Record
McDERMOTT WILL & EMERY LLP
201 South Biscayne Blvd.
Miami, FL 33131
(305) 358-3500
bberman@mwe.com

Attorneys for Respondent Pilatus Aircraft, Ltd.

March 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Petitioners represent the estates of six persons who perished aboard an aircraft that crashed in Pennsylvania. The aircraft was manufactured in Europe by respondent, a Swiss company, which sold the aircraft in Europe to a French purchaser. After several sales and resales in Europe not involving respondent, the aircraft was eventually purchased by a Rhode Island company that owned and operated the aircraft at the time of the accident. Petitioners brought this action in district court in Pennsylvania against respondent. In an interlocutory decision, the Third Circuit affirmed the district court's determination that it lacked personal jurisdiction, but vacated the district court's decision not to transfer the case to Colorado in lieu of dismissal, and remanded for further proceedings. Petitioners filed a petition for certiorari to this Court, and then, upon remand, obtained an order from the district court transferring the case to Colorado. Petitioners later voluntarily dismissed this Pennsylvania/Colorado action, the one underlying this petition, in order to avert dismissal of a subsequently-filed protective suit in the District of New Hampshire, which sustained jurisdiction over respondent and where petitioners are now actively prosecuting their claims related to the accident.

The questions presented are:

1. Whether petitioners' voluntary dismissal of the remanded action following transfer to the Colorado district court divests this Court of jurisdiction to entertain their petition for certiorari.

2. Even if petitioners had not voluntarily dismissed this case, whether a purported circuit split on the limits of stream-of-commerce personal jurisdiction theory for purposes of establishing specific personal jurisdiction would warrant review on certiorari, in a case where the product at issue was not sold through the stream of commerce.

3. Even if the underlying action had not been voluntarily dismissed by petitioners, and then, even if this Court were to consider the merits, whether the court of appeals correctly applied settled law that specific jurisdiction does not exist when the litigation does not "arise out of or relate to" activities directed to the forum.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

A. Factual Background 1

B. Procedural Background 2

(1) The Pennsylvania Action and Dismissal . 2

(2) The Third Circuit Appeal and Interlocutory Decision 3

(3) The Petition for Certiorari 5

(4) The Transfer of the Action on Remand . 5

(5) Petitioners' Voluntary Dismissal of the Colorado Action In Favor of the Subsequently Filed Action Pending in New Hampshire 6

REASONS FOR DENYING THE WRIT 7

I. PETITIONERS' VOLUNTARY DISMISSAL OF THE REMANDED AND TRANSFERRED ACTION DIVESTS THIS COURT OF JURISDICTION TO CONSIDER THE PRIOR INTERLOCUTORY RULING. 7

II. EVEN IF THIS CASE HAD NOT BEEN VOLUNTARILY DISMISSED, IT WOULD NOT IMPLICATE THE CIRCUIT SPLIT IDENTIFIED BY PETITIONERS, AND THUS WOULD NOT PROVIDE A VEHICLE FOR ADDRESSING SUCH SPLIT. 9

III. EVEN IF THIS CASE HAD NOT BEEN VOLUNTARILY DISMISSED, AND EVEN IF THIS COURT WERE TO CONSIDER THE MERITS, IT WOULD SEE THAT THE THIRD CIRCUIT PROPERLY APPLIED WELL SETTLED LAW THAT SPECIFIC JURISDICTION APPLIES ONLY TO CLAIMS "ARISING FROM OR RELATED TO" ACTIVITIES DIRECTED TOWARD THE FORUM. 15

CONCLUSION 16

APPENDIX

Appendix A: No. 08-0108, District Court of New Hampshire, Order (Nov. 9, 2009) 1b

Appendix B: No. 09-2583, District Court of Colorado, Plaintiffs' Notice of Dismissal without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) (Nov. 13, 2009) 21b

Appendix C: No. 09-2583, District Court of Colorado, Order of Dismissal without Prejudice (Nov. 16, 2009) 23b

TABLE OF AUTHORITIES

CASES

A. Uberti & Co. v. Leonardo,
892 P.2d 1354 (Ariz. 1995) 10

Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.,
148 U.S. 372 (1893) 8

Asahi Metal Indus. Co., Ltd. v. Super. Ct.,
480 U.S. 102 (1987) 2, 9, 14

Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir. 1994) 10

Bearry v. Beech Aircraft Corp.,
818 F.2d 370 (5th Cir. 1987) 13

Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967) 8

Boit v. Gar-Tec Prods., Inc.,
967 F.2d 671 (1st Cir. 1992) 10

Burger King v. Rudzewicz,
471 U.S. 462 (1985) 14, 15

Ex Parte DBI, Inc.,
23 So.3d 635 (Ala. 2009) 10

Fidelity and Cas. Co. of N.Y. v. Philadelphia Resins Corp.,
766 F.2d 440 (10th Cir. 1985) 13

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 16

Hill v. Showa Denko, K.K.,
425 S.E.2d 609 (W.Va. 1992) 10

Kernan v. Kurz-Hastings, Inc.,
175 F.3d 236 (2d Cir. 1999) 10

Kuenzle v. HTM Sport-Und Freizeitgerate AG,
102 F.3d 453 (10th Cir. 1996) 13

Lesnick v. Hollingsworth & Vose Co.,
35 F.3d 939 (4th Cir. 1994) 10

Luv N' Care, Ltd. v. Insta-Mix, Inc.,
438 F.3d 465 (5th Cir. 2006) 10

Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773 (7th Cir. 2003) 14

Tobin v. Astra Pharms. Prods., Inc.,
993 F.2d 528 (6th Cir. 1993) 10

World-Wide Volkswagon Corp. v. Woodson,
444 U.S. 286 (1980) 4

STATUTES

28 U.S.C. § 1254(1) 7
28 U.S.C. § 1631 ..... 2, 3, 5

RULES

Fed. R. Civ. P. 41(a) 7
Fed. R. Civ. P. 54(b) 3

STATEMENT OF THE CASE

A. Factual Background

On March 26, 2005, a PC-12 aircraft manufactured in 1999 by respondent Pilatus Aircraft, Ltd., a Swiss manufacturer, crashed in Pennsylvania, killing all six people aboard. Pet. App. 31a. The crash occurred as the plane was landing on a stopover on its way from Florida to Rhode Island. *Id.* Petitioners are the personal representatives of the victims' estates. *Id.*

Respondent originally sold the accident aircraft to a French buyer, which in turn resold the aircraft to a (different) Swiss company. *Id.* at 34a. The Swiss company in turn resold it to a Massachusetts company, which brought the aircraft to the U.S. in 2003. *Id.* The plane was then resold to a Rhode Island company, which operated the aircraft out of Rhode Island when it crashed. *Id.* It is undisputed that respondent was not involved in any of the aircraft's resales that led to aircraft's use in the U.S. *Id.*

It is equally undisputed that a Pilatus aircraft for sale for the U.S. is typically first sold by respondent to its U.S. subsidiary in Colorado, Pilatus Business Aircraft, Ltd. ("PilBAL"). *Id.* at 32a. PilBAL then sells the plane to one of PilBAL's independent dealers, which then sells it to a retail customer. *Id.* Even under that system, the record shows no sales to Pennsylvania retail customers through PilBAL independent dealers. *Id.* at 36a. The accident aircraft, however, did not go through this U.S. distribution system. Rather, as described above, the aircraft was sold to a European buyer, and made its way to the U.S.

through a series of purely fortuitous sales, entirely outside of respondent's U.S. distribution system.

B. Procedural Background

(1) The Pennsylvania Action and Dismissal

In March 2007, petitioners filed suit against respondent and various other component part manufacturers in the United States District Court for the Eastern District of Pennsylvania under a product liability theory. *Id.* at 37a-38a. Respondent moved to dismiss for lack of personal jurisdiction, which petitioners opposed. After oral argument on the motion, when it became apparent to petitioners that the motion to dismiss might be granted, petitioners: (1) filed an alternative motion, asking the district court, in the event it decided that it lacked jurisdiction, to transfer the case under 28 U.S.C. § 1631 to Colorado, home of Respondent's subsidiary PilBAL (*id.* at 21a); and (2) filed a duplicative, protective case against respondent in the United States District Court for the District of New Hampshire. *Id.* at 72a.

On April 30, 2008, the Pennsylvania district court granted respondent's motion to dismiss for lack of personal jurisdiction. The district court rejected petitioners' argument that specific jurisdiction existed in Pennsylvania, (a) because respondent's forum contacts were insufficient and unrelated to petitioner's claims and (b) because "stream of commerce" theory could not apply to satisfy minimum contacts for two reasons. First, under either of the tests for "stream of commerce" specific jurisdiction articulated by fractured pluralities in *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102 (1987), respondent "has not

injected its goods into the forum state with a reasonable expectation of deriving a substantial benefit." Pet. App. 12a. Second, even if respondent's distribution system in the U.S. could be considered as having injected respondent's planes into Pennsylvania with such expectations, "the subject aircraft did not enter Pennsylvania through any stream of commerce." *Id.* at 14a. Instead, respondent sold the aircraft to a European customer, and the aircraft arrived in the U.S. only by the happenstance of third-party resales. *Id.* Thus, asserting personal jurisdiction over respondent would not satisfy the "arise out of or relate to" test of specific jurisdiction. *Id.*[1]

At the same time, the district court denied petitioners' motion to transfer pursuant to 28 U.S.C. § 1631 in lieu of dismissal because petitioners did not demonstrate that the putative forum, Colorado, had personal jurisdiction over respondent. *Id.* at 27a. After the district court certified the rulings pursuant to Fed. R. Civ. P. 54(b), petitioners appealed both rulings to the Third Circuit.

(2) The Third Circuit Appeal and Interlocutory Decision

On appeal, petitioners relied exclusively on specific jurisdiction, advancing two arguments, both of which the Third Circuit rejected.

---

[1] The district court also rejected petitioners' arguments that general jurisdiction existed in Pennsylvania, an argument abandoned at the Third Circuit and not pressed here. Pet. App. 18a-20a.

First, respondents argued that because respondent "targets the United States market as a whole, it has purposeful affiliation with every state and must expect to be sued in every state where one of its aircraft crashes." *Id.* at 44a. The Third Circuit rejected this argument because respondent's efforts to exploit a national market "simply do not constitute the type of deliberate contacts within Pennsylvania that could amount to a purposeful availment of the privilege of conducting activities in that state." *Id.* at 45a. In any event, even if respondent's very limited contacts with Pennsylvania could amount to "purposeful availment" of the privilege of conducting business in Pennsylvania, petitioners could not satisfy the requirement that claims "arise out of or relate to" such purposeful availment, because the aircraft at issue was originally sold in Europe with no connection to respondent's activities in the U.S. and Pennsylvania. *Id.* at 47a.

Second, petitioners argued that specific jurisdiction exists under a stream of commerce theory, because it was foreseeable that one of its highly mobile aircraft would eventually find its way to Pennsylvania. *Id.* at 48a. The Third Circuit rejected this argument, too, for two reasons. First, the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. *Id.* Further, this Court has rejected the contention that the foreseeability analysis is influenced by the highly mobile nature of the product at issue. *Id.* (citing *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 296 n.11 (1980)). Second, "it is absolutely fatal to [petitioners'] stream-of-commerce argument that the subject aircraft did not actually enter Pennsylvania through a 'stream of commerce' as that term is

generally understood." *Id.* at 49a. That is to say, the accident aircraft had not entered Pennsylvania as a result of being placed in the stream of commerce in the U.S. through respondent's U.S. distribution system. *Id.* at 49a-51a. To hold otherwise would impermissibly remove the "arising from or related to" requirement from the specific jurisdiction test "and unjustifiably treat the stream-of-commerce theory as a source of general jurisdiction." *Id.* at 50a.

While thus affirming the district court's dismissal for lack of specific jurisdiction, the Third Circuit nevertheless reversed the Pennsylvania district court's ruling denying the petitioners' motion to transfer to Colorado, finding that petitioners had demonstrated prima facie evidence of general jurisdiction over respondent in Colorado, based on respondent's contacts with its subsidiary there. *Id.* at 58a. The Third Circuit remanded to the Pennsylvania district court the issue of whether the transfer was in the "interests of justice" as required by 28 U.S.C. § 1631. *Id.* at 59a.

(3) The Petition for Certiorari

On July 23, 2009, Petitioners requested an extension to file their certiorari petition, which was granted. On October 22, 2009, Petitioners filed their petition, seeking review of the Third Circuit's affirmance of the jurisdictional dismissal.

(4) The Transfer of the Action on Remand

On remand, with the petition for certiorari in progress but no stay of any proceedings in effect, petitioners proceeded to move for, and obtained, an

order from the Pennsylvania district court severing petitioner's claims against respondent and transferring those claims—the same claims that underpin the petition for certiorari—to Colorado on October 1, 2009. *Id.* at 68a. With this transfer, petitioners had a forum of their election, with personal jurisdiction over respondent, in which to proceed on the merits of their claims against respondent.

(5) Petitioners' Voluntary Dismissal of the Colorado Action In Favor of the Subsequently Filed Action Pending in New Hampshire

So that petitioners would not have two cases pending against respondent concerning the same plane crash, respondent asked the New Hampshire district court to dismiss the action before it in favor of petitioner's first-filed Pennsylvania/Colorado action. Petitioners opposed that motion, telling the New Hampshire court that they preferred to litigate in the second-filed action in New Hampshire, and representing to the New Hampshire court that they would moot respondent's motion based on the prior pending Pennsylvania/Colorado action by voluntarily dismissing that case if the New Hampshire court found personal jurisdiction over respondent in New Hampshire. On November 9, 2009, the New Hampshire district court obliged, finding personal jurisdiction over respondent in New Hampshire, and denying respondent's motion to dismiss in favor of the first filed action in Colorado based on, and quoting, Petitioners' representation. Opp. App. at 17b-19b (New Hampshire Order).

On November 13, 2009, consistent with their representation to the New Hampshire court,

petitioners voluntarily dismissed the Colorado action, and on November 16, 2009, the Colorado district court entered a dismissal order accordingly. Opp. App. at 21b-24b. Thus, the action giving rise to the Third Circuit appeal and to the petition for certiorari before this Court was formally terminated, and no longer exists.

Petitioners and respondent then filed, in the only remaining action in New Hampshire, a joint discovery plan approved by the court, a trial date was set, and the parties have commenced merits discovery and are actively litigating petitioners' claims.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' VOLUNTARY DISMISSAL OF THE REMANDED AND TRANSFERRED ACTION DIVESTS THIS COURT OF JURISDICTION TO CONSIDER THE PRIOR INTERLOCUTORY RULING.

Respondent's voluntary dismissal of the remanded action entirely moots their petition for certiorari review of the Third Circuit's interlocutory decision, because the underlying action no longer exists. A voluntary dismissal under Rule 41(a), Fed.R.Civ.P. extinguishes litigation and divests the courts – all courts – of any further jurisdiction. The Supreme Court's jurisdiction over certiorari review from cases in the courts of appeals, as provided under 28 U.S.C. § 1254(1), contemplates the grant of a writ "upon the petition of any party to any civil . . . case . . . ." Following petitioners' voluntary dismissal of the case against respondent, there is no party and there is no civil case.

Because petitioners voluntarily abandoned the suit that is the subject of this petition for certiorari (in order to proceed with the subsequently filed, identical action in New Hampshire and avoid its dismissal as a prior pending action), this Court not only has no reason to review the Third Circuit's interlocutory decision, it has no subject matter jurisdiction to do so. There is no action still in existence in Colorado to return to Pennsylvania.[2]

Whether petitioners' dismissal of the underlying case following transfer to Colorado is considered to divest this Court of appellate jurisdiction, or to moot

---

[2] Even prior to the voluntary dismissal, the petition would have been premature because the Third Circuit's decision was interlocutory, as it remanded for further proceedings rather affirming the district court's initial dismissal of respondents' action for lack of jurisdiction. On remand, the district court transferred the action to the district court in Colorado, where respondent did not challenge jurisdiction. In the normal course, this petition would be premature, because petitioners would have been free to seek review of the Third Circuit's interlocutory jurisdictional determination as part of any petition for certiorari from any ensuing and otherwise final decision of the Tenth Circuit. Any number of intervening circumstances might have made review by this Court ultimately unnecessary, such as petitioners prevailing on the merits of their claim in Colorado. For that reason, if the remanded and transferred action were pending in Colorado, this Court's normal practice would to be deny certiorari at this interlocutory stage of the case. *Cf. Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). As this Court recognized long ago, "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893).

the petition, or to seek an advisory opinion with no case or controversy remaining, or to constitute a waiver of petitioners' right to proceed with its petition (or an implicit withdrawal of it), the effect is the same. This action which, after petitioning for certiorari review, the petitioners later voluntarily and deliberatively abandoned in order to litigate the same claims, arising from the same accident, in the subsequently filed New Hampshire case. Petitioners abandoned this case to fulfill their promise to the New Hampshire court that they would dismiss their prior pending case if that court determined it had jurisdiction over respondent there.

In sum, there is simply nothing remaining for this Court to do here.

II. EVEN IF THIS CASE HAD NOT BEEN VOLUNTARILY DISMISSED, IT WOULD NOT IMPLICATE THE CIRCUIT SPLIT IDENTIFIED BY PETITIONERS, AND THUS WOULD NOT PROVIDE A VEHICLE FOR ADDRESSING SUCH SPLIT.

The Petition exclusively concerns the limits of basing specific jurisdiction on "stream of commerce" theory, i.e., where specific jurisdiction derives from "the regular and anticipated flow of products from manufacture to distribution to retail sale" (*see Asahi*, 480 U.S. at 117 (Brennan, J. concurring)). Pet. at 7-20.

Petitioners contend that the circuit courts have split between (1) cases where a defendant's targeting of the United States, as a whole, with its stream of commerce is sufficient to subject that defendant to personal jurisdiction in a particular state, and

(2) cases where the court requires the defendant to target the specific forum state with its stream of commerce. *See id.* at 3. Thus, each of the cases cited by petitioners as evidence of the proffered split involves allegedly defective products arriving in the national or local forum via the manufacturer's stream of commerce.[3]

However, this was not such a case. As both the district court and court of appeals expressly

---

[3] *See, e.g., Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 940-41 (4th Cir. 1994) (filters in question allegedly containing asbestos were sold to a tobacco company who incorporated the filters into cigarettes sold to a distributor for sale in Maryland); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 673 (1st Cir. 1992) (air gun at issue allegedly was sold to a national catalog retailer and resold to customer in Maine); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 610-11 (8th Cir. 1994) (fireworks in question were made in Japan and sold to a South Dakota distributor, which distributed them to Nebraska where they injured plaintiff); *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 468 (5th Cir. 2006) (allegedly infringing product sold to Walmart, which distributed it to one of its stores in Louisiana); *Tobin v. Astra Pharms. Prods., Inc.*, 993 F.2d 528-532, 543-44 (6th Cir. 1993) (manufacturer contracted with a national distributor which sold the allegedly harmful drug to doctor Kentucky who prescribed it to plaintiff); *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 239-40 (2d Cir. 1999) (stamping press was sold through manufacturer's American distributor to New York, where it injured the plaintiff); *A. Uberti & Co. v. Leonardo*, 892 P.2d 1354, 1356 (Ariz. 1995) (firearm was sold through manufacturer's sole United States distributor to plaintiff in Arizona); *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609, 656 (W.Va. 1992) (contaminated drug sold by manufacturer's wholly owned subsidiary and only American distributor to processor that sold it to a pharmacy in West Virginia); *Ex Parte DBI, Inc.*, 23 So.3d 635, 639 (Ala. 2009) (seat belt manufactured in South Korea was incorporated into a new car later sold in an dealership in Alabama).

recognized, and as petitioners do not and cannot dispute, the product here (the aircraft) did *not* go through respondent's stream of commerce. The plane was sold in Europe to a French buyer, and only reached the United States, and ultimately Pennsylvania, because of entirely haphazard and unforeseeable third party resales having nothing to do with respondent. Respondent's "regular and anticipated flow" of planes to American customers is through its U.S. subsidiary, PilBAL, and through PilBAL's network of independent dealers. Thus, even if the underlying case here were still pending, there would be no reason for this Court to grant certiorari to resolve a circuit split on an issue that was never presented in the case.

As the district court and Third Circuit concluded, because the aircraft did not actually go through the stream of commerce (Pilatus to PilBAL to independent dealers to customers), stream of commerce theory cannot provide a basis for specific jurisdiction over respondent in Pennsylvania.

The Third Circuit explained:

> In any event, it is absolutely fatal to [petitioners'] stream of commerce argument that the subject aircraft did not actually enter Pennsylvania through a 'stream of commerce' as that term is generally understood-i.e., 'the regular and anticipated flow of products from manufacture to distribution to retail sale. . . .' Any 'stream' of planes from Pilatus to Pennsylvania would begin with Pilatus's manufacture of the and be followed by Pilatus's sale of them to PilBAL. Then PilBAL would

distribute the planes to [the independent dealer], and finally [the independent dealer] would sell the planes to buyers in Pennsylvania. It is by this path—from the Swiss manufacturing facility to PilBAL to regional dealer to end purchaser—that Pilatus targets the American market and intends and expects its aircraft to reach customers in the United States, including, arguably, those in Pennsylvania.

If the claim in this case had arisen out of these efforts to serve, even indirectly, the Pennsylvania market, then it would make sense to evaluate Pilatus's conduct under the stream-of-commerce theory. . . . It is undisputed, however, that the aircraft involved in this cases did not follow the foregoing regular and anticipated path to Pennsylvania. Rather, Pilatus sold the aircraft to a French buyer who resold it to a Swiss company (not Pilatus) that, in turn, resold it to a Massachusetts company that brought it to the Untied States and sold it to the Rhode Island company, its owner at the time of the accident.

By arguing that a stream-of-commerce analysis could support jurisdiction even when the product at issue did not go through the 'stream,' [petitioners] essentially ask us to find that the stream-of-commerce theory provides an independent source of personal jurisdiction over Pilatus, a source unrelated to [petitioners'] claims. However, the fact that *other* Pilatus planes have followed a certain path to Pennsylvania and other states cannot provide

> the necessary connection between Pilatus and Pennsylvania to support specific jurisdiction in this case, because the aircraft involved here reached Pennsylvania by a series of fortuitous circumstances independent of any distribution channel Pilatus employed. If we held otherwise, we impermissibly would remove the 'arising from or related to' requirement from the specific jurisdiction test and unjustifiably would treat the stream-of-commerce theory as a source of general jurisdiction.

(Pet. App. at 49a-50a.) (citations omitted, italics in original.)

Consistent with the Third Circuit's decision, there is no inter-circuit conflict, but rather overriding and consistent agreement, that stream of commerce theory is inapplicable where the product did not actually go through the stream of commerce, but rather reached the forum some other way.[4]

---

[4] *See, e.g., Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 459 (10th Cir. 1996) (holding Utah had no personal jurisdiction because although the manufacturer sold many ski bindings in United States, the specific ski bindings were bought in Europe and brought to Utah by the plaintiff); *Fidelity and Cas. Co. of N.Y. v. Philadelphia Resins Corp.*, 766 F.2d 440, 446 (10th Cir. 1985) (finding no personal jurisdiction where plaintiff brought cables from Arkansas, where they were sent by seller, to Utah, where they failed, noting the "distinction" between stream of commerce cases and cases where "the defendant's product comes into the forum state as the result of the actions of an unconnected third party or of fortuitous events over which the defendant has no control ... [in those cases] the defendant is not subject to jurisdiction in the forum state"); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir. 1987) (holding "[a] conclusion that

Said differently, the petitioners' claim here arises from respondent's sale of an aircraft in Europe, as part of sales activities directed toward Europe. Because petitioners' suit does not arise from respondent's activities in the U.S., much less Pennsylvania, the Third Circuit correctly applied settled law and held that the district court could not assert specific jurisdiction over respondent.

Petitioners suggest that the Court resolve the uncertainty created by the fractured plurality decisions in *Asahi*, 480 U.S. at 102. But resolving the differing *Asahi* plurality views would not have resolved the issue in this case of personal jurisdiction over respondent in Pennsylvania. Like the cases cited for the petitioners' asserted inter-circuit split, *Asahi* and the cases that follow any of its pluralities presuppose that the product at issue *actually traveled through the stream of commerce*. *See id.* at 106-07 (a tire valve assembly that allegedly harmed plaintiff was sold by manufacturer to tire manufacturers that distribute

---

there is a stream of commerce ensures that the contact that caused harm in the forum occurred there through the defendant's conduct and not the plaintiff's unilateral activities; it does not ensure that defendant's relationship with the forum is continuous and systematic, such that it can be sued there" for products with no connection to the forum); *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 788 (7th Cir. 2003) (holding stream of commerce theory "is relevant only to the exercise of specific jurisdiction; it provides no basis for exercising general jurisdiction over a nonresident defendant"); *see also Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985) (noting a defendant cannot be "haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . or the 'unilateral activity of another party or a third person.'") (internal citations omitted.)

their tires to the forum state). That was simply not the case here.

Finally, Petitioners' own question presented assumes that the case arises out of or is related to the alleged purposeful availment of a national market: "Does purposeful availment of the market of the United States as a whole, which creates general jurisdiction over federal claims, also create specific jurisdiction in a state in which harm occurs *as a result of purposeful availment of the national market*." Pet. at i (emphasis added.) In this case, the harm that occurred did not result from any purposeful availment by respondent of the U.S. market, because the sale of the accident aircraft resulted from the respondent's actions directed toward the European, rather than U.S., market. Thus, this case is the wrong vehicle for deciding the question presented by petitioners.

III. EVEN IF THIS CASE HAD NOT BEEN VOLUNTARILY DISMISSED, AND EVEN IF THIS COURT WERE TO CONSIDER THE MERITS, IT WOULD SEE THAT THE THIRD CIRCUIT PROPERLY APPLIED WELL SETTLED LAW THAT SPECIFIC JURISDICTION APPLIES ONLY TO CLAIMS "ARISING FROM OR RELATED TO" ACTIVITIES DIRECTED TOWARD THE FORUM.

Under this Court's cases, and as the Third Circuit expressly recognized, it is settled law that specific jurisdiction can only apply where (1) a defendant has purposefully directed activities at the forum, and (2) the litigation arises out of or relates to such activities. *See* Pet. App. 42a (citing *Burger King v.*

Rudzewicz, 471 U.S. 462, 472 (1985) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). There is no dispute here that respondent's inconsequential activities in the forum (Pennsylvania) not only failed to meet the purposeful availment standard, but had nothing to do with the litigation. Absent anything in the record to show the aircraft's entry into the forum through a regular stream of commerce, application of this settled law compelled the conclusion reached in both the trial and appellate courts that there was no specific jurisdiction over Pilatus in Pennsylvania. Such settled law having been correctly applied, there is no purpose to be served by further review and affirmance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Jeffrey Baltruzak
McDermott Will & Emery LLP
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
jbaltruzak@mwe.com

Bruce J. Berman*
McDermott Will & Emery LLP
201 South Biscayne Blvd.
Miami, Florida 33131
(305) 358-3500
bberman@mwe.com

*Counsel of Record

Attorneys for Respondent Pilatus Aircraft, Ltd.

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: No. 08-0108, District Court of New Hampshire, Order (Nov. 9, 2009) 1b

Appendix B: No. 09-2583, District Court of Colorado, Plaintiffs' Notice of Dismissal without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) (Nov. 13, 2009) 21b

Appendix C: No. 09-2583, District Court of Colorado, Order of Dismissal without Prejudice (Nov. 16, 2009) 23b

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil No. 08-cv-108-SM
Opinion No. 2009 DNH 170

[Filed November 9, 2009]

Theresa D'Jamoos, as Executrix of the Estate of Dawn Weingeroff, et al., Plaintiffs,	)
v.	)
Atlas Aircraft Center, Inc. and Pilatus Aircraft, Ltd., Defendants.	)

ORDER

In March of 2005, a Pilatus PC-12 aircraft that had taken off from Naples, Florida, crashed in State College, Pennsylvania, during an instrument landing approach. All six people on board died. This product liability and negligence action arises out of that accident. Plaintiffs invoke this court's diversity subject matter jurisdiction over their state law claims. See 28 U.S.C. § 1332.

The plane was based in Rhode Island and those on board were residents of Rhode Island. The plaintiffs – the estates of the six victims – have named as defendants Atlas Aircraft Center, Inc. ("Atlas"), a New Hampshire corporation, and Pilatus Aircraft, Ltd. ("Pilatus"), a Swiss corporation. Pilatus moves to dismiss all of plaintiffs' claims, asserting that it has insufficient contacts with the State of New Hampshire to support this court's exercise of personal jurisdiction over it. Plaintiffs, as well as Pilatus's co-defendant, Atlas, object.

For the reasons set forth below, Pilatus's motion to dismiss for lack of personal jurisdiction is denied, as is its motion to dismiss in favor of first-filed action.

Standard of Review

A. Personal Jurisdiction: Statutory and Constitutional Prerequisites.

It is well established that when this court's diversity subject matter jurisdiction is invoked, personal jurisdiction over a nonresident defendant is determined, at least in part, by the forum state's long-arm statute. See Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 690 (1st Cir. 1993). When personal jurisdiction is contested, the plaintiff bears the burden of establishing that the court has such jurisdiction. See Sawtelle v. Farrell, 70 F.3d 1381, 1387 (1st Cir. 1995); Kowalski v. Doherty, Wallace, Pillsbury & Murphy, 787 F.2d 7, 8 (1st Cir. 1986).

Allegations of jurisdictional facts are construed in the plaintiff's favor, see Buckley v. Bourdon, 682 F.

Supp. 95, 98 (D.N.H. 1988), and, if the court proceeds based upon the written submissions of the parties without an evidentiary hearing, the plaintiff need only make a prima facie showing that jurisdiction exists. See Kowalski, 787 F.2d at 8; Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 674-75 (1st Cir. 1992). Nevertheless, to defeat a motion to dismiss, plaintiff's demonstration of personal jurisdiction must be based on specific facts set forth in the record. See TicketMaster–New York, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994); Negron-Torres v. Verizon Communications, Inc., 478 F.3d 19, 23 (1st Cir. 2007). And, "[i]n reviewing the record before it, a court 'may consider pleadings, affidavits, and other evidentiary materials without converting the motion to dismiss to a motion for summary judgment.'" VDI Technologies v. Price, 781 F. Supp. 85, 87 (D.N.H. 1991) (quoting Lex Computer & Management Corp. v. Eslinger & Pelton, P.C., 676 F. Supp. 399, 402 (D.N.H. 1987)); see also Gar-Tec Products, 967 F.2d at 675-76.

Before a court may exercise personal jurisdiction over a non-resident defendant, the plaintiff must show, first, that the forum state's long-arm statute confers jurisdiction over the defendant, and second, that the exercise of jurisdiction comports with constitutional due process standards (by establishing that the defendant has sufficient "minimum contacts" with the forum state). See Kowalski, 787 F.2d at 9-10. New Hampshire's individual long-arm statute, N.H. Rev. Stat. Ann. ("RSA") 510:4, extends personal jurisdiction over foreign defendants "to the full extent that the statutory language and due process will allow." Phelps v. Kingston, 130 N.H. 166, 171 (1987). Likewise, New Hampshire's corporate long-arm statute, RSA 293-A:15.10, authorizes jurisdiction over foreign

corporations and unregistered professional associations to the full extent permitted by federal law. See Sawtelle, 70 F.3d at 1388. Stated another way, New Hampshire's individual and corporate long-arm statutes reach as far as the due process protection afforded by the federal constitution will allow. Accordingly, the court need only determine whether the exercise of personal jurisdiction over a foreign defendant would comport with federal constitutional guarantees.

To exercise personal jurisdiction over a foreign defendant in a manner consistent with the Constitution, the plaintiff must demonstrate that the defendant has "certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (citation and internal punctuation omitted). And, to conclude that a defendant has such "minimum contacts," the court must first be satisfied that the defendant's conduct bears such a "substantial connection with the forum State" that the defendant "should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-75 (1985) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

B. General v. Specific Jurisdiction.

A court may exercise either general or specific personal jurisdiction over a defendant. "General jurisdiction exists when the litigation is not directly founded on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous

and systematic activity, unrelated to the suit, in the forum state." United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088 (1st Cir. 1992); see also Negron-Torres, 478 F.3d at 25. Specific personal jurisdiction, on the other hand, exists when the plaintiff's cause of action arises directly out of, or relates to, the defendant's forum-based contacts. United Elec. Workers, 960 F.2d at 1088-89.

In an effort to assist trial courts in determining whether they may properly exercise specific personal jurisdiction, the Court of Appeals formulated a three-part test:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in¬state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Id. at 1089; see also Negron-Torres, 478 F.3d at 24. An affirmative finding as to each of those three elements – relatedness, purposeful availment, and reasonableness – is necessary to support the court's exercise of specific personal jurisdiction over a defendant. See Phillips Exeter Academy v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999).

With those principles in mind, the court turns to Pilatus's motion to dismiss.

Background

The PC-12 is a single-engine turbo-prop aircraft. Pilatus manufactured the PC-12 at issue in Switzerland in 1999 and sold it in Europe to a French buyer. Following several intervening resales, the aircraft was purchased by a Rhode Island limited liability company and, in 2003, it was transported to the United States. According to plaintiffs, Atlas then inspected, serviced, and maintained the aircraft on a continuous basis prior to March 26, 2005 (the date of the crash).

Plaintiffs advance two causes of action against Pilatus, which, reduced to their essence, allege the following:

1. Pilatus negligently designed, manufactured, and tested the Pilatus PC-12 model aircraft – conduct (and/or omissions) that proximately caused the fatal crash (the "Defective Aircraft Claim").

2. Pilatus produced, sold, and otherwise distributed deficient maintenance manuals and specifications for the inspection and maintenance of the PC-12 and the procedures described in those manuals were followed, which proximately caused the fatal crash (the "Service Manuals Claim").

And, say plaintiffs, Pilatus has sufficient contacts with this forum to warrant the exercise of both general and specific personal jurisdiction over it. Pilatus disagrees.

Discussion

I. General Jurisdiction.

Although plaintiffs (and Defendant Atlas) assert that the court may properly exercise general personal jurisdiction over Pilatus, they have failed to demonstrate that Pilatus has engaged in continuous and systematic activity, unrelated to the suit, in this forum. See, e.g., D'Jamoos v. Pilatus Aircraft Ltd., 2008 WL 1902193 at *8-9 (E.D. Pa. April 30, 2008) (concluding, under similar factual circumstances, that that court lacked general personal jurisdiction over Pilatus), vacated in part on other grounds, 566 F.3d 94 (3d Cir. 2009).[1] See also Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 138 (1st Cir. 2006) ("The standard for evaluating whether defendants' alleged contacts satisfy the constitutional general jurisdiction test is considerably more stringent than that applied to specific jurisdiction questions.") (citation and internal punctuation omitted).

Most of the forum-based activity to which plaintiffs point was not carried out directly by Pilatus. Instead, it was performed by its wholly-owned, Colorado-based subsidiary, Pilatus Business Aircraft, Ltd. ("PBAL"). And, neither plaintiffs nor Atlas has attempted to

---

[1] Plaintiffs originally sued Pilatus in the United States District Court for the Eastern District of Pennsylvania. But, when it appeared that that court might not have personal jurisdiction over Pilatus, plaintiffs' added Pilatus as a defendant in this case. For a relatively brief period, then, there was parallel litigation in this forum and Pennsylvania. As noted below, however, the Pennsylvania action against Pilatus has since been transferred to the District of Colorado.

demonstrate that the court may properly exercise personal jurisdiction over Pilatus based upon the forum contacts of PBAL (e.g., they have not attempted to show that PBAL is a sham corporation, or an alter ego of Pilatus, or an agent of Pilatus). See, e.g., Andresen v. Diorio, 349 F.3d 8, 12 (1st Cir. 2003); Donatelli v. National Hockey League, 893 F.2d 459, 465 (1st Cir. 1990). As the District Court for the District of Massachusetts has observed:

> The First Circuit Court of Appeals has indicated that personal jurisdiction over parent companies "invariably" depends upon the finding of a "plus" factor, "something beyond the subsidiary's mere presence within the bosom of the corporate family." A plus factor of that sort exists 1) where the association between parent and subsidiary demonstrates an agency relationship between the two, 2) where the exercise of control by the parent over the subsidiary goes beyond that "degree of control innately inherent in the family relationship" or 3) where the subsidiary is "merely an empty shell." In all such cases, the parent's relationship to the subsidiary implies that it has availed itself of the benefits of the forum state where the subsidiary is subject to personal jurisdiction.

Ruiz v. Bally Total Fitness Holding Corp., 447 F. Supp. 2d 23, 27 (D. Mass. 2006) (citing Donatelli, 893 F.2d at 465-66); see also Platten, 437 F.3d at 139 ("The bar is set even higher in a case like this one, in which plaintiffs seek to disregard the corporate form. The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its

nonresident parent, even if the parent is sole owner of the subsidiary. There is a presumption of corporate separateness that must be overcome by clear evidence.") (citations and internal punctuation omitted).

Here, beyond merely identifying PBAL's substantial forum contacts, plaintiffs have not attempted to establish the existence of the "plus" factor identified by the court of appeals nor, necessarily, have they borne their burden of overcoming the presumption of corporate separateness by clear evidence.

II. Specific Jurisdiction.

A. The Service Manuals Claim.

Plaintiffs have, however, adequately demonstrated that the court may properly exercise specific personal jurisdiction over Pilatus (at least as to the Service Manuals Claim). Among other things, the parties' jurisdictional discovery has revealed that Pilatus sold more than 300 maintenance manuals, service bulletins, and other technical documents directly to Atlas, with knowledge that Atlas was using those documents to perform required annual and 100-hour inspections on at least some of the many PC-12 aircraft hangered in this state.[2] Such purposeful business-related contacts with this forum are sufficient

---

[2] According to plaintiffs, "[t]he largest flying fleet of Pilatus PC-12 aircraft in the world is located in New Hampshire." Plaintiffs' memorandum in support of jurisdictional discovery (document no. 37) at 6.

for this court to exercise specific personal jurisdiction over Pilatus consistent with the requirements of due process. Stated somewhat differently, consideration of each of the relevant factors - relatedness, purposeful availment, and reasonableness – counsels in favor of the exercise of specific personal jurisdiction over Pilatus with respect to the Service Manuals Claim.

First, plaintiffs' claims against Pilatus relate to, and arise directly out of, Pilatus's sale of the maintenance manuals and service bulletins in this forum. See, e.g., Amended Complaint at paras. 50(e) & (f) (alleging that Pilatus "negligently provid[ed] maintenance specifications for t the inspection and maintenance of the airframe fuel filter and fail[ed] to provide adequate warnings relating thereto" and "negligently provid[ed] Service Bulletins, maintenance instructions, and other specifications for maintenance and inspection of the subject aircraft, and fail[ed] to provide adequate warnings relating thereto"). Here, the relationship between plaintiffs' Service Manuals Claim and Pilatus's sale of those allegedly defective service and maintenance manuals in this forum is neither attenuated nor indirect. See United Elec. Workers, 960 F.2d at 1089. Rather, Pilatus's sale of those manuals to Atlas forms an "important, or at least material, element of proof in the plaintiffs' case," id. (citation and internal punctuation omitted) because Atlas allegedly relied upon those materials when servicing the PC-12 at issue in this case. See generally Harlow v. Children's Hosp., 432 F.3d 50, 60-61 (1st Cir. 2005).

Next, by selling those maintenance manuals and service bulletins directly to Atlas, Pilatus purposefully availed itself of the privilege of conducting business

activities in this forum. "The function of the purposeful availment requirement is to assure that personal jurisdiction is not premised solely upon a defendant's 'random, isolated, or fortuitous' contacts with the forum state." Sawtelle, 70 F.3d at 1391 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)). Here, Pilatus's sales of maintenance and service manuals in the state of New Hampshire were not random, isolated, or fortuitous. Rather, they were knowing and purposeful. According to the record, Pilatus made such sales nearly every month from at least April of 2003 through February of 2008. Under those circumstances, Pilatus's contacts with this forum were both direct and voluntary. And, Pilatus certainly could have foreseen that, should there be a liability claim arising from alleged defects in one or more of those manuals, it would likely be haled into court in this forum. See Ticketmaster, 26 F.3d at 207 (describing "voluntariness" and "foreseeability" as the "cornerstones of purposeful availment").

Finally, the exercise of personal jurisdiction over Pilatus - at least as to plaintiffs' Service Manuals Claim - would be both fair and reasonable in light of the so-called "gestalt factors." Those factors are: (1) the burden on defendant to appear in the forum; (2) the interests of the forum state in adjudicating the plaintiff's claims; (3) the convenience of the plaintiff; (4) the interests of the judicial system in the effective and efficient administration of justice; and (4) the "common interests of all sovereigns in promoting substantive social policies." Sawtelle, 70 F.3d at 1395.

While defending against plaintiffs' claims in this forum is, to some extent, burdensome, Pilatus has not shown any "special or unusual burden." Pritzker v.

Yari, 42 F.3d 53, 64 (1st Cir. 1994). This is particularly true since, eventually, Pilatus will have to defend against plaintiffs' claims in some forum in this country, whether it be New Hampshire or Colorado. See D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 108 (3d Cir. 2009) ("[Plaintiffs] have made a prima facie showing that, given Pilatus's direct contacts within Colorado, the exercise of general jurisdiction over Pilatus in Colorado would comport with due process.").[3]

As for New Hampshire's interest in providing a judicial forum for the parties' dispute, the court of appeals has noted that a state has a "demonstrable interest in exercising jurisdiction over one who causes tortious injury within its borders." Ticketmaster, 26 F.3d at 211. Additionally, the court of appeals "has repeatedly observed that a plaintiff's choice of forum must be accorded a degree of deference with respect to the issue of its own convenience." Sawtelle 70 F.3d at 1395. Here, given the fact that one of the defendants – Atlas – resides in New Hampshire, it certainly makes sense that plaintiffs would prefer to litigate their negligence and product liability claims here (given, for

---

[3] Unless overturned by the Supreme Court, that decision is law of the case and, therefore, binding on the parties and the district court in Colorado. See D'Jamoos, 566 F.3d at 111 ("[W]e point out that by characterizing our jurisdictional finding as 'prima facie,' we do not suggest that our decision is tentative or preliminary. Rather, if the District Court determines on remand that a transfer is in the interest of justice and transfers the case to the District of Colorado, we believe that the Colorado court will be bound by our prima facie finding of personal jurisdiction insofar as that ruling will be law of the case.") (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816-17 (1988)).

example, the presence of relevant witnesses, documents, etc.).

Finally, it is difficult to say that the "common interests of all sovereigns in promoting social policies" weighs heavily either in favor of, or against, this court's exercise of personal jurisdiction over Pilatus. But, because substantial discovery has already taken place in this forum, and because one of the defendants resides in this state (along with many of its employees, some of whom are likely to be witnesses), the interests of judicial economy and efficiency counsel in favor of the exercise of personal jurisdiction over Pilatus -- again, at least as to plaintiffs' Service Manuals Claim.

B. The Defective Aircraft Claim.

Because plaintiffs must demonstrate that the court has personal jurisdiction over Pilatus as to each of their claims, it is appropriate to consider whether there is an independent basis to exercise specific personal jurisdiction over Pilatus with respect to the Defective Aircraft Claim. See generally Phillips Exeter Academy, 196 F.3d at 289 ("We commend the lower court's decision to analyze the contract and tort claims discretely. Questions of specific jurisdiction are always tied to the particular claims asserted.").

Here, for largely the same reasons expressed by the Court of Appeals for the Third Circuit, the court concludes that if plaintiffs' Defective Aircraft Claim were standing alone, the court would lack specific personal jurisdiction over Pilatus. See D'Jamoos, 566 F.3d at 103-06. In short, plaintiffs' claim that Pilatus defectively designed and manufactured (in Europe) the PC-12 aircraft at issue in this case does not "directly

arise out of, or relate to, [Pilatus's] forum-state activities." United Elec. Workers, 960 F.2d at 1089. As the Court of Appeals for the Third Circuit observed with respect to personal jurisdiction in Pennsylvania:

> The record before us conclusively establishes that Pilatus's direct contacts within Pennsylvania are quite limited . . . . Although Pilatus designed and manufactured the subject aircraft, it did so in Switzerland and then sold the plane in Europe. The aircraft later reached the United States via a series of third-party resales in which Pilatus was not involved, only arriving in Pennsylvania because it was making a stopover on an interstate flight. Pilatus did not profit from activities in Pennsylvania as a result of the aircraft's initial sale or resales. And although a small number of Pilatus's PC-12s are based in Pennsylvania, there is no record evidence indicating how those planes reached Pennsylvania. Certainly, we have no basis to believe that Pilatus sent the planes to Pennsylvania.

D'Jamoos, 566 F.3d at 103 (footnote omitted). Virtually the same facts and legal analysis apply with regard to Pilatus's contacts with New Hampshire. The only distinction is that Pilatus regularly sent the service and maintenance manuals discussed above to Atlas. Those contacts with this forum are, however, unrelated to plaintiffs' claim that Pilatus designed, manufactured, and sold a defective aircraft.

III. Pendent Personal Jurisdiction.

The doctrine of pendent personal jurisdiction (at least as it applies in diversity cases) essentially provides that "where a plaintiff has established jurisdiction over a non-resident defendant with respect to one state law cause of action, the court[] . . . will exercise jurisdiction over that defendant with respect to related state claims" that would not, on their own, support personal jurisdiction. Val Leasing, Inc. v. Hutson, 674 F. Supp. 53, 56 (D. Mass. 1987). See also Anderson v. Century Prods. Co., 943 F. Supp. 137, 145 (D.N.H. 1996) (court exercised pendent personal jurisdiction with respect to contract claim after concluding that it had personal jurisdiction over defendant as to plaintiff's tort claims); Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1181 (9th Cir. 2004) ("When a defendant must appear in a forum to defend against one claim, it is often reasonable to compel that defendant to answer other claims in the same suit arising out of a common nucleus of operative facts. We believe that judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by adopting this doctrine."); United States v. Botefuhr, 309 F.3d 1263, 1273 (10th Cir. 2002) ("[T]he majority of federal district courts and every circuit court of appeals to address the question have upheld the application of pendent personal jurisdiction, and we see no reason why, in certain situations, the assertion of pendent personal jurisdiction would be inappropriate.") (citations omitted).

Professors Wright and Miller summarized the doctrine of pendent personal jurisdiction as follows:

> [T]he pendent personal jurisdiction doctrine in both the diversity and federal question contexts is best articulated as follows: a district court has discretion to exercise personal jurisdiction over a claim that it ordinarily lacks personal jurisdiction over only when that claim arises out of the same common nucleus of operative fact as does a claim that is within the in personam jurisdiction power of the court. . . Under this description of the doctrine, a district court may not reach beyond the forum state's long-arm statute merely because doing so would promote efficiency. The court first must find that the additional claim is within the same common nucleus of operative fact as a claim that already falls within the ambit of the forum state's long-arm statute.

4A C.A. Wright & M.K. Miller, Federal Practice and Procedure § 1069.7 (2d ed. 1995).

In the exercise of its discretion, the court concludes that it is appropriate to apply that doctrine in this case. Because both of plaintiffs' claims against Pilatus arise out of the same common nucleus of operative fact, the court may properly exercise personal jurisdiction over Pilatus as to the Defective Aircraft Claim. Both claims – the Defective Aircraft Claim and the Service Manuals Claim – arise from the crash of the Pilatus aircraft in Pennsylvania. By virtue of having personal jurisdiction over Pilatus with regard to the Service Manuals Claim, the court may properly exercise personal jurisdiction over Pilatus as to any remaining related claims.

IV. Pilatus's Motion to Dismiss First-Filed Action.

As noted above, the United States District Court for the Eastern District of Pennsylvania - the court in which plaintiffs' filed virtually identical claims against Pilatus – recently transferred those claims to the United States District Court for the District of Colorado. D'Jamoos v. Pilatus Aircraft Ltd., Case no. 07-1153 (E.D. Pa. Oct. 1, 2009). See generally 28 U.S.C. § 1631. In the wake of that transfer, Pilatus has filed a motion to dismiss this action in favor of the "first-filed" action now pending in Colorado.

Plaintiffs object and, in response, say: (1) they have consistently made clear their intention to litigate their claims against Pilatus in a single forum; (2) they would prefer to litigate those claims in New Hampshire, given the fact that they are already litigating claims against Atlas here and because it is reasonably close to Rhode Island - the state in which the plaintiffs reside; and (3) "[s]hould this Court rule that it has personal jurisdiction over Pilatus, the plaintiffs will immediately dismiss their claims against Pilatus in Colorado." Plaintiff's memorandum (document no. 74) at 2.

The judicial opinions (and the legal treatise) upon which Pilatus relies in support of its motion to dismiss are not on point. In those cases, the so-called "first-filed rule" arose when, after a plaintiff had sued a defendant in a particular forum, that defendant subsequently sued the plaintiff in a different forum. The question then arose as to whether the two related cases should be consolidated and, if so, in which forum. See TPM Holdings, Inc. v. Intra-Gold Indus., 91 F.3d 1 (1st Cir.1996); Cianbro Corp v. Curran-Lavoie, Inc.,

814 F.2d 7 (1st Cir. 1987). See also James Moore, Moore's Federal Practice § 111.13[1][o] (2009) ("If two actions involving the same parties and identical issues ('mirror image' actions) are pending in different districts, whether filed in those courts originally or removed there, competing motions to dismiss or transfer to the other district frequently are made in both actions. In general, under the 'first-filed rule,' the first-filed action will be given priority and be allowed to proceed in favor of the later action, unless convenience or other special circumstances dictate departure from the rule.") (footnotes omitted) (emphasis supplied).

Here, however, both this case and the one that was recently transferred to Colorado were filed by the estates of the six victims of the crash. And, those plaintiffs have expressed a preference to litigate their claims against Pilatus in this forum (along with their claims against Atlas). They have also stated that if this court concludes that it may properly exercise personal jurisdiction over Pilatus (which it has), then they will dismiss the identical claims currently pending in Colorado.

Given the somewhat unusual facts of this case, the plaintiffs' preference for litigating their claims in this forum, and the fact that plaintiffs are already litigating claims arising out of the crash in this forum against another defendant, dismissing or transferring their claims against Pilatus to Colorado would not represent an efficient use of judicial resources. It would, however, cause the parties to unnecessarily incur substantial additional legal fees and would likely impose an unnecessary burden on at least some of the

potential witnesses in this proceeding (many of whom presumably live in New Hampshire and Rhode Island).

Accordingly, in the exercise of its discretion, the court declines Pilatus's invitation to dismiss this case (or transfer it to the United States District Court for the District of Colorado for consolidation with the pending case in that forum).

Conclusion

Plaintiffs have carried their burden of demonstrating that the court may, consistent with principles of due process and fundamental fairness, exercise personal jurisdiction over the defendant, Pilatus Aircraft, Ltd. Accordingly, Pilatus's Renewed Motion to Dismiss for Lack of Personal Jurisdiction (document no. 50) is denied. And, for the reasons discussed above, as well as those set forth in plaintiffs' memorandum (document no. 74), Pilatus's motion to dismiss in favor of first-filed action (document no. 71) is denied.

Plaintiffs' motion to strike (document no. 77), and their motion to file a seven page reply brief (document no. 82) are denied as moot.

SO ORDERED.

/s/
Steven J. McAuliffe
Chief Judge

November 9, 2009

cc: Anthony Tarricone, Esq.
Danial A. Nelson, Esq.
Patrick T. Jones, Esq.
Thomas R. Watson, Esq.
Howard B. Klein, Esq
Mark B. Decof, Esq.
Peter J. Schneider, Esq.
Corey J. Wright, Esq.
Julie L. Belanger, Esq.
Michael P. Lehman, Esq.
William J. Katt, Esq.
Bruce J. Berman, Esq.
Jeffrey Baltruzak, Esq.
Jeffrey A. Rossman, Esq.
Garry R. Lane, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO (DENVER)

No. 1:09-CV-02583-REB-BNB

[Filed November 13, 2009]

THERESA D'JAMOOS, as Executrix of the Estate of Dawn Weingeroff, et al.,	)
Plaintiffs,	)
v.	)
PILATUS AIRCRAFT, LTD.,	)
Defendants.	)

PLAINTIFFS' NOTICE OF DISMISSAL WITHOUT PREJUDICE PURSUANT TO FED.R.CIV.P 41(a)(1)(A)(i)

All of the plaintiffs hereby dismiss this action against Pilatus Aircraft Ltd. without prejudice.

By their attorneys,

/s/

Joseph P. Musacchio
(*Pending Admission Pro Hac Vice*)
KREINDLER & KREINDLER, LLP
277 Dartmouth Street
Boston, MA 02116
(617) 424-9100

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on all counsel of record via first class mail on November 12, 2009.

/s/

Joseph P. Musacchio

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 09-cv-02583-REB-BNB

[Filed November 16, 2009]

THERESA D'JAMOOS, as Executrix of the Estate of Dawn Elizabeth Weingeroff, FREDERICK L. WEINGEROFF, Administrator of the Estate of Leland Weingeroff, FREDERICK L. WEINGEROFF, Executor of the Estate of Gregg C. Weingeroff, STANLEY J. WACHTENHIEM, Executor of the Estate of Jeffrey M. Jacober, MICHAEL A. JACOBER, Co-Executor of the Estate of Karen L. Jacober, DAVID S. JACOBER, Co-Executor of the Estate of Karen L. Jacober, MICHAEL A. JACOBER, Co-Executor of the Estate of Eric B. Jacober, and DAVID S. JACOBER, Co-Administrator of the Estate of Eric B. Jacober,	)
Plaintiffs,	)
v.	)

PILATUS AIRCRAFT LTD,)
)
Defendant.)
_____)

ORDER OF DISMISSAL WITHOUT PREJUDICE

Blackburn, J.

The matter before me is the **Plaintiffs' Notice of Dismissal Without Prejudice Pursuant to Fed.R.Civ.P. 41(a)(1)(A)(I)** [#16] filed November 13, 2009. After careful review of the notice and the file, I conclude that the notice should be approved and that this action should be dismissed without prejudice.

THEREFORE, IT IS ORDERED as follows:

1. That the **Plaintiffs' Notice of Dismissal Without Prejudice Pursuant to Fed.R.Civ.P. 41(a)(1)(A)(I)** [#16], filed November 13, 2009, is **APPROVED**; and

2. That this action is **DISMISSED WITHOUT PREJUDICE** with the parties to pay their own attorney fees and costs.

Dated November 16, 2009.

BY THE COURT:

/s/
Robert E. Blackburn
United States District Judge